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No. 88-1153

The Supreme Court of the United States of America

OCTOBER TERM, 1988

W. W. RODGERS AND SONS PRODUCE, INC.,
W. W. RODGERS AND SONS PROPERTIES, INC.,
W. W. RODGERS AND SONS FRUITS AND VEGETABLES, INC.,
APPLE TRUCKING, INC., LETTUCE INVEST, INC.
AND ROY DOUGLAS RODGERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. RESPONDENT'S CENTRAL ARGUMENT IN OPPOSITION OF WRIT OF CERTIORARI BASED UPON THE FIRST PRONG OF *DI BELLA V. UNITED STATES* IS INAPPOSITE BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS MADE NO FINDING WITH RESPECT TO THAT ISSUE IN THIS CASE.

Respondent concedes in its Brief in Opposition that there currently exists a split of authority among the

circuit courts of appeals as to whether the government's act of authorizing a grand jury precludes appellate review of a Rule 41(e) order under *Di Bella v. United States*, 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962). Nevertheless, the government argues that this case does not offer the Court an opportunity to resolve the lower courts' disagreement over the second prong of the *Di Bella* test because, according to Respondent, Petitioners' action fails to satisfy the first prong of *Di Bella* requiring that their Rule 41(e) motion be filed solely for the return of property. Respondent's reliance on and legal analysis of the application of the first prong of the *Di Bella* test is totally without merit in this case. That is indisputable because, very simply, the Court of Appeals made no finding with respect to that issue in either its consideration of, or ruling on, Petitioners' Appeal. *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790, No. 88-1355, Slip Op. at 3, Appendix A at A-2 (5th Cir. Sept. 2, 1988).

The various circuit courts of appeals have uniformly held that a determination with respect to the first prong of *Di Bella* can only be made after a review of the pleadings and arguments to determine whether the "primary purpose" and "essential character" of the Rule 41(e) motion is for the return of property or is an attempt to suppress evidence. *Matter of 949 Erie Street, Racine, Wis.*, 824 F.2d 538, 541 (7th Cir. 1987); *In Re Grand Jury Proceedings*, 716 F.2d 493, 495 (8th Cir. 1983); *Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983); *United States v. Furina*, 707 F.2d 82, 84 (3rd Cir. 1983); *United States v. Regional Consulting Services*, 766 F.2d 870, 873 (4th Cir. 1985).

Thus, because the Fifth Circuit's analysis of *Di Bella* was limited solely to the second prong, and the Court of

Appeals did not review the "essential character" of Petitioners' pleadings or arguments with respect to the first prong of *Di Bella*, Writ of Certiorari should be granted to resolve the direct conflict between the circuit courts of appeals with respect to whether the authorization of a federal grand jury constitutes a criminal prosecution *in esse* for purposes of the second prong of *Di Bella*.

II. RESPONDENT ALSO ERRONEOUSLY ARGUES THAT THE FIFTH CIRCUIT COURT OF APPEALS, BY REFUSING TO ADDRESS PETITIONERS' APPEAL, DID NOT DETERMINE WHETHER 28 U.S.C §1331 PROVIDES A DISTRICT COURT WITH FEDERAL QUESTION JURISDICTION OF A RULE 41(e) MOTION.

Respondent also argues that the Fifth Circuit Court of Appeals dismissed Petitioners' appeal solely on the ground that the existence of a federal grand jury precluded appellate review pursuant to the second prong of *Di Bella* and that the Court of Appeals made no holding with respect to 28 U.S.C. §1331. The government plainly misconstrues the action taken by the Fifth Circuit Court of Appeals.

Petitioners asserted two independent jurisdictional bases for their Rule 41(e) motion: (1) federal question jurisdiction pursuant to 28 U.S.C. §1331; and (2) the district court's anomalous jurisdiction. Although the Fifth Circuit Court of Appeals held that the second prong of *Di Bella* precluded appellate review, it also held that the district court's action was not based "wholly or even partially on jurisdictional grounds." *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790,

No. 88-1355, Slip Op. at 2, Appendix A at A-2, n. 1 (5th Cir. Sept. 2, 1988).

This erroneous finding is critical because, as the Court of Appeals itself noted in its Opinion, an order with respect to a Rule 41(e) motion is immediately appealable in the Fifth Circuit if the district court denies the motion on jurisdictional grounds and does not render a decision on the merits. *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790, No. 88-1355, Slip Op. at 2, Appendix A at A-2 (5th Cir. Sept. 2, 1988). *See also, Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975).

Thus, the Court of Appeals' erroneous finding that the district court did not dismiss Petitioners' Rule 41(e) motion on jurisdictional grounds was, in fact, an independent basis for dismissing Petitioners' appeal. If the Court of Appeals had correctly determined that the district court dismissed Petitioners' Rule 41(e) motion on jurisdictional grounds, it would not have dismissed Petitioners' appeal in accordance with *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975).

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and this Reply Brief, certiorari should be granted in this case. The decision of the Fifth Circuit Court of Appeals is in direct conflict with the decisions of at least four other courts of appeals and is inconsistent with *Di Bella* and other earlier opinions of this Court. If left standing, the decision of the Court of Appeals for the Fifth Circuit will serve to foreclose any effective relief pursuant to Rule 41(e), which is contrary to the intent of both Congress and this Court in adopting Rule 41(e).

Respectfully submitted,

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